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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 SCOTT A.,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL  
14 SECURITY,

15 Defendant.

CASE NO. 3:21-cv-05393-JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

16  
17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local  
18 Magistrate Judge Rule MJR 13. *See also* Consent to Proceed Before a United States Magistrate  
19 Judge, Dkt. 2. This matter has been fully briefed. *See* Dkts. 16, 23, 24.

20 Plaintiff, who alleges that he is disabled due to physical and mental impairments,  
21 including depression, anxiety, and personality disorder, challenges the Administrative Law  
22 Judge's ("ALJ") evaluation of two opinions from examining psychologist, Dr. Wheeler. Plaintiff  
23 requests that the Court remand this case for an award of benefits.  
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1 The Court concludes that the ALJ erred in evaluating Dr. Wheeler's opinions that  
2 plaintiff would have a number of work-related limitations, including that he would be markedly  
3 limited in his abilities to maintain work attendance and to complete a normal workday and  
4 workweek without interruption from his symptoms. In rejecting these opinions, the ALJ  
5 overlooked Dr. Wheeler's objective clinical findings supporting her opinions and erroneously  
6 concluded that Dr. Wheeler relied on plaintiff's subjective complaints in finding that plaintiff has  
7 significant work-related limitations. The ALJ further erred by finding—without explanation—  
8 that plaintiff's daily activities are inconsistent with Dr. Wheeler's opined limitations, despite that  
9 Dr. Wheeler was aware of and considered the same activities in rendering her opinions.

10 The ALJ's errors were not harmless, and crediting Dr. Wheeler's opinions as true, the  
11 ALJ would be required to find plaintiff disabled on remand. Therefore, remanding this case for  
12 the ALJ to reevaluate the evidence would serve no useful purpose. Accordingly, remand for  
13 award of benefits is the appropriate remedy.

#### 14 **PROCEDURAL HISTORY**

15 Plaintiff's application for Supplemental Security Income ("SSI") benefits pursuant to 42  
16 U.S.C. § 1382(a) (Title XVI) of the Social Security Act was denied initially and following  
17 reconsideration. *See* AR 64. Plaintiff's requested hearing was held before ALJ Lawrence Lee  
18 on August 4, 2020. *See* AR 64. On September 23, 2020, the ALJ issued a written decision in  
19 which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security Act. *See*  
20 AR 64–82.

21 On April 8, 2021, the Appeals Council denied plaintiff's request for review, making the  
22 written decision by the ALJ the final agency decision subject to judicial review. AR 1; *see* 20  
23 C.F.R. § 404.981. Plaintiff filed a complaint in this Court seeking judicial review of the ALJ's  
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1 written decision in May 2021. *See* Dkts. 1, 5. Defendant filed the sealed administrative record  
 2 (“AR”) regarding this matter on October 5, 2021. *See* Dkt. 14.

### 3 **BACKGROUND**

4 Plaintiff, Scott A., was born in 1980 and was 38 years old on the alleged date of disability  
 5 onset of July 12, 2018. *See* AR 64, 80. Plaintiff obtained his GED, and his prior work history  
 6 includes work as a restaurant waiter and busser. *See* AR 94, 99. Plaintiff states that he stopped  
 7 working due to his conditions. *See* AR 309.

8 According to the ALJ, plaintiff has at least the severe impairments of congestive heart  
 9 failure, depression, anxiety, personality disorder, cannabis abuse, and history of alcohol and  
 10 methamphetamine abuse in sustained full remission. AR 66.

### 11 **STANDARD OF REVIEW**

12 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of  
 13 social security benefits if the ALJ’s findings are based on legal error or not supported by  
 14 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th  
 15 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

### 16 **DISCUSSION**

17 Plaintiff argues that the ALJ erred in evaluating the medical opinions of an examining  
 18 psychologist, Dr. Wheeler. *See* Dkt. 16, at 5–12. Finding this issue dispositive, the Court  
 19 declines to address plaintiff’s remaining arguments.

#### 20 **I. Evaluation of Medical Opinion Evidence**

##### 21 **A. Medical Opinion Standard of Review**

22 For cases filed on or after March 27, 2017, the Administration has directed ALJs that  
 23 they are no longer to defer to medical opinions from treating or examining sources (*see* 20  
 24

1 C.F.R. §§ 404.1527(c)), instead evaluating the persuasiveness of medical opinions by analyzing  
 2 their “supportability” and “consistency,” as well as other appropriate factors. 20 C.F.R. §  
 3 404.1520c(a).

4 As this Court has previously concluded, the post-March 2017 regulations supplant  
 5 judicial precedent regarding the weight given to controverted examining and treating medical  
 6 opinions, to the extent that there is any conflict. *See* Dkt. 20, *Mooney v. Comm’r of Soc. Sec.*,  
 7 3:19-cv-05103-RBL-JRC (W.D. Wash. Feb 14, 2020) (report and recommendation adopted  
 8 March 9, 2020); Dkt. 15, *Martinson v. Comm’r of Soc. Sec.*, 3:20-cv-05149-JRC (W.D. Wash.  
 9 August 25, 2020).

10 The parties do not challenge that the revised regulations apply. *See* Dkts. 16, at 8; 23, at  
 11 4. Based on the analysis above, the Court reviews solely whether the ALJ’s decision is  
 12 supported by substantial evidence and is free from legal error. *See Lambert v. Saul*, 980 F.3d  
 13 1266, 1277 (9th Cir. 2020). That is, the ALJ “must provide sufficient reasoning that allows us to  
 14 perform our own review, because the grounds upon which an administrative order must be  
 15 judged are those upon which the record discloses that its action was based.” *Id.* (internal  
 16 citations and quotations omitted).

#### 17 **B. Dr. Wheeler’s 2019 and 2020 Opinions**

18 Kimberly Wheeler, Ph.D. examined and evaluated plaintiff on two occasions: in March  
 19 2019 and May 2020. *See* AR 1251–55, 1616–20. Dr. Wheeler’s March 2019 examination  
 20 consisted of a clinical interview, mental status examination (“MSE”), and review of plaintiff’s  
 21 health records, including treatment records and a prior psychological evaluation from 2015. AR  
 22 1251–55. Based on her examination, Dr. Wheeler diagnosed plaintiff with major depressive  
 23 disorder, social anxiety with some generalized anxiety disorder elements, methamphetamine use  
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1 disorder in sustained full remission, and alcohol use disorder in sustained full remission. AR  
2 1252. Dr. Wheeler opined that plaintiff would have a number of mild to marked limitations on  
3 his abilities to perform work activities, including that plaintiff would be markedly limited in his  
4 abilities to maintain regular attendance and be punctual within customary tolerances and to  
5 complete a normal workday and workweek without interruptions from his symptoms. *See* AR  
6 1253.

7 In May 2020, Dr. Wheeler examined plaintiff a second time. *See* AR 1616–20. Dr.  
8 Wheeler’s second examination consisted of a clinical interview, MSE, review of Washington  
9 State Department of Social and Health Services (“DSHS”) case notes, and review of Dr.  
10 Wheeler’s March 2019 evaluation. *See id.* Based on her second evaluation, Dr. Wheeler  
11 diagnosed plaintiff other specified personality disorder (mixed avoidant, dependent traits), social  
12 anxiety with generalized anxiety disorder elements, unspecified depressive disorder, alcohol use  
13 disorder in sustained remission, and methamphetamine use disorder in sustained remission. AR  
14 1618. Dr. Wheeler again opined that plaintiff would have a number of mild to marked functional  
15 limitations, with an overall severity rating of “marked” based on the combined impact of all  
16 diagnosed mental impairments. *See id.*

17 Addressing both opinions together, the ALJ found that Dr. Wheeler’s opinions were “not  
18 persuasive” because (1) they are inconsistent with the overall medical evidence of record; (2) Dr.  
19 Wheeler relied on plaintiff’s subjective complaints in assessing his functioning; (3) the opinions  
20 are inconsistent with plaintiff’s daily activities; (4) the opinions are inconsistent with plaintiff’s  
21 minimal treatment history and his conditions are “stable” on a medication regimen; (5) the  
22 opinions are not consistent with plaintiff’s performance during MSEs; and (6) Dr. Wheeler failed  
23 to consider the effects of plaintiff’s marijuana use on his motivation and functioning. AR 78–79.  
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1 With respect to the first reason, the ALJ concluded—without explanation—that Dr.  
2 Wheeler’s opinions are inconsistent with the overall medical evidence of record. AR 79.  
3 “Consistency” with the record as a whole is an important factor that an ALJ must consider when  
4 evaluating a medical opinion. 20 C.F.R. § 416.920c(b)(2), (c)(2). However, the ALJ must  
5 “explain” how he considered “consistency” in evaluating a medical opinion. *Id.* at §  
6 416.920c(b)(2). The ALJ’s failure to explain how Dr. Wheeler’s opinions are inconsistent with  
7 the overall medical evidence of record runs afoul of 20 C.F.R. § 416.920c and is error. *See id.*;  
8 *see also Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003) (“We require the ALJ to build an  
9 accurate and logical bridge from the evidence to her conclusions so that we may afford the  
10 claimant meaningful review of the SSA’s ultimate findings.”).

11 Next, the ALJ found that Dr. Wheeler “primarily relied” on plaintiff’s subjective  
12 complaints in assessing the opined limitations, implying that Dr. Wheeler’s opinions are not  
13 supported by objective medical evidence. AR 79. As with consistency, “supportability” is an  
14 important factor in evaluating a medical opinion, and an ALJ must “articulate” how he  
15 considered this factor in his written decision. 20 C.F.R. § 416.920c(a), (b)(2).

16 However, in this case, the ALJ appears to have overlooked objective evidence supporting  
17 Dr. Wheeler’s opinions. For example, during plaintiff’s 2019 MSE, Dr. Wheeler observed that  
18 plaintiff’s mood was anxious, his affect blunted, and that his concentration was not within  
19 normal limits. *See* AR 1254–55 (also noting diffuse, vague and deflective speech; low energy  
20 and misunderstanding of questions asked). Likewise, during the 2020 MSE, Dr. Wheeler  
21 observed that plaintiff’s mood was “blah, bland,” his affect blunted, and that his memory,  
22 concentration, and judgment and insight were not within normal limits. AR 1619–20 (also  
23 noting plaintiff’s low energy, marginally cooperative attitude, and distraction during the  
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1 examination). These objective findings tend to support Dr. Wheeler's opinions that plaintiff has  
2 mood and functional symptoms that would limit his abilities to perform work activities. *See*  
3 Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental Status Examination* 4 (Oxford  
4 University Press 1993) ("Like the physical examination, the Mental Status Examination is  
5 termed the *objective* portion of the patient evaluation."). Thus, the ALJ's conclusion that Dr.  
6 Wheeler primarily relied on plaintiff's subjective complaints in rendering her opinions, and that  
7 the opinions are not supported by objective evidence, is not supported by substantial evidence.  
8 *See Lambert*, 980 F.3d at 1277; *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014)  
9 ("[W]hen an opinion is not more heavily based on a patient's self-reports than on clinical  
10 observations, there is no evidentiary basis for rejecting the opinion.").

11       Regarding the ALJ's third reason, the ALJ also found Dr. Wheeler's opinions  
12 unpersuasive because they are inconsistent with plaintiff's reported activities. AR 79. Here, the  
13 ALJ identified plaintiff's ability to prepare meals, perform household chores, use public  
14 transportation, shop independently, and watch YouTube videos as evidence suggesting that  
15 plaintiff's functioning is not as limited as alleged. *See id.* However, Dr. Wheeler was aware that  
16 plaintiff was capable of such activities, and she nonetheless opined that plaintiff would be  
17 limited in his abilities to carry out work activities. *See* AR 1252, 1617 (noting daily activities of  
18 watching TV/YouTube, ability to shop for himself, do some house chores and spend time  
19 socializing with family and friends). Without additional explanation, it is not clear to the Court  
20 how the cited daily activities are inconsistent with plaintiff's reported activities or with Dr.  
21 Wheeler's opined limitations. *See* 20 C.F.R. § 916.920c(b)(2) (An ALJ is required to explain  
22 how he considered consistency of a medical opinion with other evidence of record); *see also*  
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1 *Blakes*, 331 F.3d at 569. Therefore, the ALJ’s conclusion that plaintiff’s reported daily activities  
2 are inconsistent with Dr. Wheeler’s opinions is not supported by substantial evidence.

3       Next, the ALJ found—without explanation—that Dr. Wheeler’s opinions are inconsistent  
4 with plaintiff’s minimal treatment history, as well as evidence showing that plaintiff’s conditions  
5 are “stable on only his medication regimen.” AR 79. As noted above, the ALJ may find that a  
6 medical opinion’s inconsistency with the medical evidence of record renders that opinion less  
7 persuasive. *See* C.F.R. § 920c(c)(2). However, the ALJ must explain any such inconsistencies.  
8 *See id.* at § 920c(a), (b)(2). Again, the ALJ failed to explain how plaintiff’s lack of medical  
9 treatment and stability on medication are inconsistent with Dr. Wheeler’s opinion. *See* 20 C.F.R.  
10 920c(a), (b)(2) (requiring explanation of inconsistencies); *see also Lambert*, 980 F.3d at 1277  
11 (the ALJ must provide sufficient reasoning for his findings).

12       Further, Dr. Wheeler noted that plaintiff’s treatment history was minimal and that he was  
13 taking medication for his anxiety. *See* AR 1251 (also noting that plaintiff was previously placed  
14 on a psychiatric hold when he became irrational and wanted to leave a hospital during cardiac  
15 treatment), AR 1616 (also noting that plaintiff was evaluated another time when his mother  
16 became worried and called the authorities). Dr. Wheeler further addressed plaintiff’s lack of  
17 treatment, noting that he would need a “seasoned therapist” to address plaintiff’s “avoidant” and  
18 “dependent” behavior and symptoms. AR 1253, 1616. Taking these factors into consideration,  
19 Dr. Wheeler opined that plaintiff would still have significant work-related limitations. *See* AR  
20 1618; *see also Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) (“[T]he fact that claimant  
21 may be one of millions of people who did not seek treatment for a mental disorder until late in  
22 the day is not a substantial basis on which to conclude that [a physician’s] assessment of  
23 claimant’s condition is inaccurate.”).



1        Additionally, the record does not support the ALJ’s characterization of plaintiff as being  
2        “stable on only his medication regimen.” AR 79. Rather, it appears that although plaintiff  
3        remained on the same medication, he nonetheless continued to complain of increased depression,  
4        fatigue, and medication side effects and to display mood, affect and other symptoms. *See* AR  
5        1040–1041, 1064–65, 1130–31, 1150, 1511–1514, 1516–1520; *see also Ghanim v. Colvin*, 763  
6        F.3d 1154, 1164 (9th Cir. 2014) (finding error where the ALJ improperly “cherry-picked”  
7        aspects of the record that support the ALJ’s decision, while failing to develop the record on  
8        aspects of the record that support a finding of disabling limitations). Thus, without further  
9        explanation, it is unclear to the Court how plaintiff’s lack of treatment and continued medication  
10        regimen are inconsistent with Dr. Wheeler’s opinions. *See* 20 C.F.R. § 404.927c(a), (b)(2);  
11        *Blakes*, 31 F.3d at 569. Accordingly, the ALJ’s conclusions are not supported by substantial  
12        evidence.

13        As for the ALJ’s fifth reason, the ALJ concluded that Dr. Wheeler’s opinions are  
14        inconsistent with plaintiff performance during Dr. Wheeler’s MSEs, which “only show some  
15        deficits in mental functioning.” AR 79. As discussed above, Dr. Wheeler observed a number of  
16        abnormalities displayed by plaintiff during MSEs, including that plaintiff’s mood was anxious,  
17        his affect was blunted, and his concentration and memory were not within normal limits. *See* AR  
18        1254–55, 1619–20. Again, these findings tend to support to support Dr. Wheeler’s opinions that  
19        plaintiff has mood and functional symptoms that would limit his abilities to perform work  
20        activities. Thus, by characterizing plaintiff’s MSE performance as showing “only some deficits  
21        in mental functioning” (AR 79), the ALJ appears to have overlooked portions of MSEs and  
22        improperly substituted his own judgment for that of Dr. Wheeler’s observations. *See Reddick v.*  
23        *Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (When an ALJ seeks to discredit a medical opinion, he  
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1 must explain why his own interpretations, rather than those of the doctor, are correct.); *see also*  
 2 *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990) (“[J]udges, including administrative law  
 3 judges of the Social Security Administration, must be careful not to succumb to the temptation to  
 4 play doctor. [ . . . ] Common sense can mislead; lay intuitions about medical phenomena are often  
 5 wrong.”) (internal citations omitted).

6 Finally, the ALJ found that Dr. Wheeler “failed to examine the effects of plaintiff’s  
 7 chronic marijuana use on his motivation and functioning.” AR 79. The ALJ did not explain how  
 8 such a finding would undermine Dr. Wheeler’s opinions, as he was required to do. *See* 20  
 9 C.F.R. § 920c(a), (b)(2). Even so, substantial evidence does not support the ALJ’s finding.  
 10 During the 2019 examination, Dr. Wheeler was aware of plaintiff’s daily marijuana use, and she  
 11 found that even if plaintiff were sober, the effects of his mental impairments would still impact  
 12 basic work activities. *See* AR 1251, 1253. Similarly, during the 2020 examination, Dr. Wheeler  
 13 noted that plaintiff had stopped using marijuana and that plaintiff would still be limited in  
 14 performing basic work activities. *See* AR 1617–18. Thus, it appears that Dr. Wheeler did  
 15 consider plaintiff’s marijuana use and its impact on plaintiff’s functioning. To the extent that the  
 16 ALJ concluded that Dr. Wheeler’s opinions are inconsistent with or not supported due to  
 17 plaintiff’s marijuana use, he failed to specify or explain any such conflict. *See* AR 79; 20 C.F.R.  
 18 § 404.920c(a), (b)(2); *Lambert*, 980 F.3d at 1277.

19 In sum, the ALJ’s evaluation of Dr. Wheeler’s opinions was not supported by substantial  
 20 evidence. The Court further finds that the ALJ’s error was not harmless. Had the ALJ fully  
 21 credited Dr. Wheeler’s opinions regarding plaintiff’s mental limitations, the residual functional  
 22 capacity (“RFC”) would have included greater limitations. *See Marsh v. Colvin*, 792 F.3d 1170,  
 23 1173 (9th Cir. 2015) (quoting *Stout v. Comm’r*, 454 F.3d 1050, 1055–56 (9th Cir. 2006)) (“a  
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1 reviewing court cannot consider [an] error harmless unless it can confidently conclude that no  
2 reasonable ALJ, when fully crediting the testimony, could have reached a different disability  
3 determination.””).

## 4 **II. Remaining Issues**

5 Plaintiff also argues that the ALJ improperly considered plaintiff’s drug and alcohol use  
6 in discrediting plaintiff’s subjective complaints. Dkt. 16, at 12. Additionally, plaintiff argues  
7 that the ALJ’s decision was constitutionally defective because of the unconstitutional  
8 appointment and removal of the Commissioner of Social Security. *See id.* at 13–20. Because the  
9 case may be resolved without considering plaintiff’s remaining arguments, the Court declines to  
10 address these issues.

## 11 **III. Remand for Award of Benefits**

12 Plaintiff asks the Court to remand this case for an award of benefits. *See* Dkt. 16, at 21.  
13 A remand for an award of benefits is appropriate “where ‘(1) the record has been fully developed  
14 and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to  
15 provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical  
16 opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be  
17 required to find the claimant disabled on remand.’” *Trevizo v. Berryhill*, 871 F.3d 664, 682–83  
18 (9th Cir. 2017) (quoting *Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)). But “[w]here  
19 there is conflicting evidence, and not all essential factual issues have been resolved, a remand for  
20 an award of benefits is inappropriate.” *See Treichler v. Cmm’r*, 775 F.3d 1090, 1101 (9th Cir.  
21 2014).

22 Here, the record is well-developed regarding plaintiff’s mental limitations, the focus of  
23 Dr. Wheeler’s opinions. Considering Dr. Wheeler’s examining relationship with plaintiff and  
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1 the overall evidence of record supporting Dr. Wheeler’s opinions, any further administrative  
 2 proceedings would not be helpful in reevaluating any inconsistencies in the state agency  
 3 reviewing doctors’ opinions, where only a limited number of plaintiff’s medical records were  
 4 reviewed. *See* AR 149–50, 171–73; *see also* 20 C.F.R. § 920(c)(3)(v) (“A medical source may  
 5 have a better understanding of your impairment(s) if he or she examines you than if the medical  
 6 source only reviews evidence in your folder.”). Further, every other examining or reviewing  
 7 doctor of record opined that plaintiff would be at least markedly limited in his abilities to  
 8 perform activities within a schedule and maintain regular attendance within customary  
 9 tolerances; to maintain appropriate behavior in a work setting; and to complete a normal  
 10 workday and workweek without interruptions from symptoms. *See* AR 1129–32, 1208–12,  
 11 1217–26, 1232–39, 1243–48, 1256–57; *but see* AR 1145–51 (examining opinion regarding  
 12 diagnoses but giving no functional assessment).

13 If Dr. Wheeler’s opinions were credited as true, particularly her opinion that plaintiff is  
 14 markedly limited in his abilities to maintain regular attendance and to complete a normal  
 15 workday and workweek without interruptions from symptoms, the ALJ would be required to find  
 16 plaintiff disabled on remand. *See* AR 1253, 1618; *Revels v. Berryhill*, 874 F.3d 648, 665 (9th  
 17 Cir. 2017) (citing *Lingenfelter v. Astrue*, 504 F.3d 1028, 1041 n. 12 (9th Cir. 2007)) (“Because  
 18 the [vocational expert] testified that a [plaintiff] with the physical limitations outlined in [a  
 19 treating doctor]’s medical opinion would be unable to do any full-time work, the [treating  
 20 doctor]’s medical opinion *alone* establishes that [the plaintiff] is entitled to benefits.”).

21 The ALJ and plaintiff’s attorney questioned the vocational expert (“VE”) at the hearing  
 22 regarding whether plaintiff would be competitively employable if he was absent from work more  
 23 than one day per month or was off task more than 10% in a workday. *See* AR 109–12. In each  
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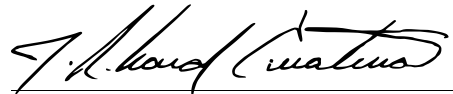
1 instance, the VE testified that a person with these limitations would not be able to maintain  
2 competitive employment. *See id.* Therefore, crediting Dr. Wheeler's opinions as true, there is  
3 no serious question regarding plaintiff's lack of employability, and remand for an award of  
4 benefits is the appropriate remedy.

### 5 CONCLUSION

6 Based on these reasons and the relevant record, the Court **ORDERS** that this matter be  
7 **REVERSED** and **REMANDED** for an award of benefits.

8 **JUDGMENT** should be for **PLAINTIFF** and the case should be closed.

9 Dated this 18th day of January, 2022.

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12 J. Richard Creatura  
13 Chief United States Magistrate Judge  
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